No. 91-2019

IN THE

Supreme Court of the United States

October Term 1992

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY DICKERSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION FOR LEAVE TO FILE BRIEF
AND
BRIEF OF AMICI CURIAE,

MINNESOTA COUNTY ATTORNEYS ASSOCIATION,
Joined By
NATIONAL DISTRICT ATTORNEYS ASSOCIATION, THE STATES OF ALASKA, DELAWARE, FLORIDA, ILLINOIS, INDIANA, THE COMMONWEALTH OF KENTUCKY, THE STATES OF MISSOURI, MONTANA, NEW JERSEY, NORTH CAROLINA, THE COMMONWEALTHS OF PENNSYLVANIA, PUERTO RICO, THE STATES OF SOUTH CAROLINA,

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IN SUPPORT OF PETITIONER STATE OF MINNESOTA

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Minnesota County Attorney's Association ("MCAA"), National District Attorneys Association, Inc. ("NDAA"), Hawaii Prosecuting Attorneys Association, Indiana

Prosecuting Attorneys Council, Kansas County and District Attorneys Association, Louisiana District Attorneys Association, Massachusetts District Attorneys Association, New Mexico District Attorneys Association, Pennsylvania District Attorneys Association, Oregon District Attorneys Association, South Carolina Commission on Prosecution Coordination, South Dakota State's Attorneys Association, Virginia Association of Commonwealth's Attorneys, and the Washington Association of Prosecuting Attorneys respectfully move for leave to file the attached brief as amici curiae. States sponsored by their attorney general according to Rule 37.5 have joined in this brief. In support of this Motion, the above-named Movants would show the court as follows:

1. Interest of Amici Curiae. MCAA represents all the county attorneys in the State of Minnesota. By law, county attorneys

have the responsibility of prosecuting all those accused of committing serious criminal offenses in their jurisdiction. MCAA has submitted numerous amicus curiae briefs to the Minnesota Supreme Court and has joined in amicus briefs filed in this Court.

NDAA is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all our citizens.

Other movants perfo[illegible]imilar functions in their respective States.

2. Specific Interest in the Case at Bar. Movants' members are continuously engaged in the prosecution of criminal cases, including many bases presenting issues

related to those in the case at bar. Their statutory obligations are directly affected by decisions under the Fourth Amendment precluding the introduction of evidence. Since Movants' members appear in trial courts to represent the states in these cases, they may be able to assist the Court in developing the issues fully.

3. Purpose of Amicus Curiae Brief. Movants' purpose, in this brief, is to analyze the case authority in ways that are not present in other briefs. Amici Curiae have communicated with counsel for Petitioner in an effort to avoid undue duplication. It is believed that this brief argues the issues in a manner different from that in Petitioner's Petition for Writ of Certiorari.

4. Public Importance of the Issues Addressed Here. The decision of the Minnesota Supreme Court in State v. Dickerson adversely and critically impacts the ability

of law enforcement personnel and prosecutors effectively to counter trafficking in dangerous drugs. Frequently, police officers so engaged are genuinely in fear of their lives and must frisk individuals they detain on suspicion of drug involvement. When they discover drugs in the course of legitimate frisks they must have authority to seize -- and get off the street -- those drugs.

A hypertechnical decision like that in Dickerson deters effective drug enforcement to the detriment of the public interest.

5. Requests for Consent. The consent of the Petitioner to the filing of this brief has been requested and granted. The consent of Respondent has been requested and refused. Letters from the counsel of record of both parties are appended. This Motion is therefore filed in accordance with the Rules of this Court.

FOR THESE REASONS, movants pray that they be granted leave to file the attached brief as amici curiae.

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI

Amici are prosecutor associations and States that support the Petitioner's position and urge this Court to grant a Writ of

Certiorari. Amici interest in this case concerns the effect the misapplication of the Fourth Amendment in this case will have upon the equitable administration of justice nationwide and upon prosecutors' ability to enforce the law.

The decision below upsets the balance maintained consistently since this Court's decision in Terry v. Ohio, 392 U.S. 1 (1968), between the officer's right to investigate in safety and the suspect's right to liberty and privacy.

At issue is, simply, whether the officer can rely on information derived from all five of his acutely trained senses and take action to the extent that the Fourth Amendment permits.

QUESTION PRESENTED

Whether a police officer who with justification has stopped and is frisking a person he comes upon in suspicious circumstances, may remove and seize an object he immediately identifies as contraband by feeling it through the person's outer clothing in the course of the frisk without violating the Fourth Amendment to the United States Constitution.

STATEMENT OF FACTS[1]

At 8:15 p.m. on November 9, 1989, Officer Vernon Ross of the Minneapolis Police Department was patrolling with his partner in a marked squad car on the city's north side. Ross was at the time a 14-year veteran of the Department, having spent 11-1/2 of those years on the north side and having had

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1. The facts are derived from the majority and dissenting opinions in the Minnesota Supreme Court.

extensive recent experience working on cases involving narcotics and weapons.

As they drove southbound on Morgan Avenue South, the officers saw a man, later identified as respondent Timothy Eugene Dickerson, leaving a three-story, 12-unit apartment building which was a notorious "crack house" that "goes 24 hours a day." It had been the subject of much complaint from the community, including "aldermanic complaint," and had been raided by police on "numerous" occasions, with drugs and weapons, including knives, handguns and sawed-off shotguns, being seized.

As respondent walked from the front entrance of the building toward the front sidewalk, he looked up and made eye contact with the officers, then made an "abrupt . . . strange and suspicious" change in direction, apparently "just because he saw a police car." As respondent headed toward the alley

instead of toward the street, the officers drove into the alley and stopped him.

The officer had never seen respondent before and knew of no criminal activity by him.

While subjecting respondent to a pat-down search of his outer clothing, a thin nylon jacket, Officer Ross felt a lump in respondent's jacket pocket. With the clothing between his hands and the object, Ross "examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." Ross had "felt [crack] before in clothing" -- approximately 50 to 75 times -- and "was absolutely sure that's what it was, or I would have left it there."

To this point, Ross had been "just patting the outside." Upon detecting the presence of the lump which he was certain was crack cocaine, he reached in and seized the

substance, which was in fact crack cocaine, and arrested respondent.

SUMMARY OF ARGUMENT

When an experienced police officer is authorized to frisk a person whose behavior he is investigating, contraband felt and identified may be removed and seized. Stated differently, the sense of touch, with other information that precipitated the investigation, has yielded the officer probable cause to arrest the suspect and seize the contraband. Exigent circumstances exist rendering impossible the officer's securing of a warrant.

ARGUMENT

The Fourth Amendment to the United States Constitution proscribes only such searches and seizures as are unreasonable. This Court's vital decision in Terry v. Ohio, 392

U.S. 1, 20-21 (1968) holds that "there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' Camera v. Municipal Court, 387 U.S. 523, 534-535, 536-537, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967). And in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."

In short, the extent of intrusion into the protected liberty and privacy of a person must be commensurate to the suspicious circumstances occasioning it.

In the instant case, the right of Officer Ross to stop respondent and to frisk him for weapons is not at issue; all Courts that have considered the matter agree that the

officer's articulable suspicions warrant that degree of intrusion. The point in controversy is whether the extent of the intrusion is excessive or whether it "was reasonably related in scope to the circumstances which justified the interference in the first place." [Terry v. Ohio, 392 U.S. at 20].

What evidence the opinion of the court in Terry provides suggests that a frisk limited to the outer clothing of the suspect will generally pass constitutional muster.

> "The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.
>
> "The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then

> he merely reached for and removed the guns. He did not invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find. [392 U.S. 29-30].

* * * *

> "Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." [392 U.S. at 30]. [Emphasis added]

In the instant case, Office Ross was engaged in a properly limited frisk of the outer surface of respondent's thin nylon

jacket pocket when he felt a lump which, from its size and the way it slid, he knew to be a lump of crack cocaine in cellophane.

> "If, while conducting a legitimate Terry search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances. Coolidge v, New Hampshire, 403 U.S. 443, 465, 91 S.Ct. 2022, 2037, 29 L.Ed.2d 564 (1971); Michigan v. Tyler, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978); Texas v. Brown, 460 U.S. at 739, 103 S.Ct., at 1541 (plurality opinion by Rehnquist, J.); id.,at 746, 103 S.Ct. at 1545 (Powell, J., concurring in the judgment).

Michigan v. Long, 463 U.S. at 1050.

Professor LaFave recognizes that

> "Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a Terry analysis. There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable cause."[2]

This Court's decisions, ignored in the Minnesota Supreme Court's holding in this case, direct that under the Fourth Amendment deference should be paid to the officers' "training and experience to draw inferences and make deductions that might well elude an untrained person. United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695 66 L.Ed.2d 621 (1981)." Texas v. Brown, 460 U.S. 730, 746 (1983) (officer knew tied off balloons found in car contained contraband; this satisfies "immediately apparent" test of Coolidge v. New Hampshire, 403 U.S. 443 (1971)).

As the dissenting opinion in the Minnesota Supreme Court concludes, the Court's majority had "rather cavalierly" questioned Officer Ross' capacity to make the

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2. [Footnote omitted] LaFave, Search and Seizure, (2nd ed. 1987) (9.4(c) at 524.

"absolutely sure" identification he made, doubting the credibility of a police officer of fourteen years experience -- much of it on the very streets he was then patrolling.

Contrary to the view expressed in the majority opinion in the Minnesota Supreme court, it does not weigh against Officer Ross that he directed his partner to stop the car "so he could search the defendant for weapons and drugs." This was said in light of the facts that respondent was coming from a notorious around-the-clock crack house. Given his training and experience, Officer Ross meant he would search if his understanding of the Fourth Amendment allowed it.

There is no longer a requirement that plain view observations need be inadvertent. Horton v. California, ___ U.S. ___, 110 S.Ct. 2301, 2308-10 (1990). It suffices if the officer is legitimately in the position from

which he can view the object and the incriminating nature is "immediately apparent."[3] Indeed, the qualification that the object's status as contraband be "immediately apparent" states it too strongly because the test is one of probable cause to seize, not absolute certainty.[4] The officers' decision to seize may be based on contemporaneous observations together with other data previously available to them.

It makes no sense even to suggest, as did the majority in the Minnesota Supreme Court, that procuring a warrant be required

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3. Compare Coolidge v. New Hampshire, 403 U.S. 443 (1971) with Arizona v. Hicks, 480 U.S. 321 (1987).

4. "Decisions by this Court since Coolidge indicate that the use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory nature of evidence is necessary for an application of the 'plain view' doctrine."

Texas v. Brown, 460 U.S. at 743; Colorado v. Bannister, 449 U.S. 1, 3-4 (1980).

on these facts prior to seizure, because the suspect will long be gone at the time of its issuance. Were the officer to seize the person of the suspect while getting a warrant, a far greater intrusion into his liberty would be worked than any privacy right compromised by the seizure of the contraband identified in the frisk. Texas v. Brown, 460 U.S. 730, 739 (1983).

In addition, it is difficult to see how, or in what significant way, respondent's liberty and privacy were interfered with by Officer Ross' sliding the object he felt in respondent's thin nylon jacket pocket, beyond what in an admittedly valid frisk he had already suffered.

A frisk entails "a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons . . . performed by a policeman while the citizen stands helpless, perhaps

facing a wall with his [other] hands raised . . ." Terry v. Ohio, 392 U.S. at 16-17.

> The officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and the area about the testicles, and entire surface of the legs down to the feet.

LaFave, Search and Seizure § 9.4(b) at p. 519, quoting Brian Martin, Searching and Disarming Criminals, 45 J. Crim. L. C. P. S. 481 (1954).

The additional intrusion on respondent's privacy of the officer's sliding his hand on the outside over the object felt in respondent's jacket pocket is de minimus.

Given the rapid time sequence from initiation of the frisk to identification of the crack cocaine, it may be inferred that the officers' determination the pocket didn't contain weapons but did contain contraband was one course of conduct; the same acts

performed within seconds essentially yielded both conclusions.

This court has held that authorities may use additional techniques in addition to a frisk to protect their safety without impermissibly extending the intrusion into the suspect's protected liberty or privacy. [Requiring motorist to get out of car, Pennsylvania v. Mimms, 934 U.S. 106 (1970 (search of car's interior for weapons); Adams v. Williams, 407 U.S. 143 (1972); Michigan v. Long, 463 U.S. 1032 (1983).

That Officer Ross made the ultimate determination that respondent had contraband in his pocket through his sense of feel and not one of the other four senses is without logical -- hence constitutional -- significance. By definition, the significant information derived from a frisk or pat-down is made available by the sense of touch.

It makes no sense to conclude that, regardless of circumstances, "the sense of touch is inherently less immediate and less reliable than the sense of sight." In a darkened room or on a street at night, an officer is well advised to use touch rather than sight to determine whether a suspect has capacity to do him harm.

Equally subject to question is the bald assertion that "the sense of touch is far more intrusive into . . . personal privacy" than seeing what the suspect has within his pockets.

This Court has recognized that probable cause to seize contraband can be based on the sense of smell of a police officer whose experience permits him to identify what he is smelling. Johnson v. United States, 333 U.S. 10 (1948); United States v. Johns, 469 U.S. 478 (1985). "Feel" is certainly as available and as reliable as "smell."

This Court "has not specifically adopted or directly addressed the plain touch corollary to the plain view doctrine. . .",[5] but the Petition for Writ of Certiorari cites the relevant cases from which it can be demonstrated that the majority of jurisdictions accept the corollary.[6]

Arrest can, so long as the suspect is not in his home, be made without warrant and evidence seized incident to it be received in evidence; it isn't of constitutional significance that the formal arrest follows the search so long as the information gleaned in the search is not used to justify the arrest. In addition, the officer knew respondent had just come from a "crack house"

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5. Holtz, The "Plain Touch" corrollary: A Natural and Foreseeable Consequence of the Plain View Doctrine, 95 Dickinson Law Rev. 521 (1991).

6. Petition for Writ of Certiorari at pp. 15-21; See also State v. Alamont, 577 A.2d 665 (R.I. 1990) (uphold and apply plan touch corollary); State v. Washington, 134 Wis.2d 108, 396 N.W.2d 156, 161-162 (1986).

that "goes 24 hours a day" and saw respondent change his direction abruptly and suspiciously after making eye contact with the officer. These factors together produced Officer Ross' certain identification of the contraband
-- ample to constitute probable cause to arrest and to seize the crack cocaine incident thereto. See Cupp v. Murphy, 412 U.S. 291 (1973) (search on probable cause before arrest but with exigent circumstances).

Vigilance is necessary to deal with the case where a frisk is continued or intensified without justification after it is determined that the detainee is not armed and thus not dangerous. This is not that case.

CONCLUSION

For the reasons stated, amicus prays the court grant certiorari in this matter and reverse the erring Federal constitutional decision made in the State Court.

Respectfully submitted,

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